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Defining the Word: "Maintain"; Context Counts

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SYMPOSIUM: *ERIE* UNDER ADVISEMENT: THE DOCTRINE AFTER *SHADY GROVE*

DEFINING THE WORD "MAINTAIN"; CONTEXT COUNTS

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Let us assume that a major New York corporation with one of its manufacturing plants in Vermont determines to eliminate 500 of its employees, all of whom are employees at will. The purpose of the layoff is to cut costs because the company's profits have declined substantially in a down market.

A number of the Vermont employees seek the advice of a Vermont attorney to determine if they may have their employment status restored. The lawyer erroneously decides that the workers have a valid case under Vermont law. A class action, based on diversity of citizenship, is brought in the Vermont federal court, requesting equitable relief. The federal trial court immediately dismisses the case on the ground that the plaintiffs have no substantive cause of action. Sounds simple.

But wait a minute—plaintiff's attorney points to Federal Rule of Civil Procedure 23.[1] He notes that all the "prerequisites" of Rule 23(a) are met and that the case also meets the requirements of Rule 23(b). The attorney then notes the language of Rule 23(b), which says that a "class action may be *maintained*" if Rules 23(a) and (b) are met.[2] He argues that *The Oxford English Dictionary* gives as one of sixteen definitions of the word "maintain" to mean "to carry on (an action at law); to have *ground for sustaining* (an action)."[3] Therefore, he argues that under the

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1. FED. R. CIV. P. 23.

2. *Id.* (emphasis added).

3. OXFORD ENGLISH DICTIONARY (3d ed. 2000), *available at* http://www.oed.com/view/Entry/112562?rskey=kKnvXT&result=2&isAdvanced=false#eid (emphasis added).

specific terms of Rule 23, the case can continue and be submitted to a jury for a determination.

The attorney's proposed result in our hypothetical is, of course, absurd, but that is true only because in context that is not what Rule 23 means by the term "maintain." To understand what a word means, especially one such as "maintain" that has multiple formal definitions, one must consider the background and purpose for which it is utilized. With regard to Rule 23 in a diversity of citizenship case, one must define the word in light of the United States Supreme Court decision in *Erie Railroad Co. v. Tompkins*, requiring federal courts to apply state substantive law,[4] the Rules Enabling Act, prohibiting federal procedural rules that "abridge, enlarge or modify any substantive right,"[5] and the background and purpose of Rule 23. Given these factors, an interpretation of the word "maintain" to permit a direct alteration of the state substantive law would not only be improper, but would raise significant questions as to the validity of the rule.

Unfortunately, in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,[6] Justice Scalia, writing for himself and three others,[7] does not appear to recognize that the word "maintain" has significant different meanings depending upon the context in which it is used.[8] When faced with an argument that Rule 23 has separate meanings and must be interpreted not to overstep the Rules Enabling Act, he responded, "If the Rule were susceptible to two meanings—one that would violate § 2072(b) and another that would no—we would agree . . . but it is not. Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met."[9] That statement is meaningless until one analyzes and understands the proper interpretation of the word "maintain" in the context used. It cannot be said that all one has to do is to read the words as printed in the rule, because, as we have seen in the above hypothetical, "maintenance" of a case, without understanding the context and purpose, could have an entirely different meaning—one that has a definite substantive aspect that would allow a plaintiff's case to go forward in direct opposition to the applicable substantive law.

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4. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 68 (1938).

5. 28 U.S.C. § 2072 (1934).

6. 130 S. Ct. 1431 (2010).

7. Justice Scalia's opinion was joined by Chief Justice Roberts and Justice Thomas. *Id.* at 1436-48. Justice Sotomayor also joined that portion of the opinion relevant to the above discussion. *Id.* at 1442-44.

8. *See id.* at 1437-42.

9. *Id.* at 1441-42 (emphasis original) (internal citations omitted).

In *Shady Grove*, a diversity case in a federal court, the Supreme Court was required to determine whether a New York statute conflicted with Federal Rule 23.[10] That statute reads:

> Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.[11]

If the statute is merely a procedural limitation on class suits that conflicts with Rule 23, then of course, in a case in a federal court, the federal rule controls.[12] But if the New York provision is designed only to eliminate a class' right to relief to obtain redress for a penalty, it is a substantive provision that does not conflict with Rule 23 and must be applied by the federal court.[13] Here, Justice Scalia makes it very clear that we care not at all what was meant by the New York legislature when it enacted the provision.[14] All we care about is what the legislation says! In responding to the argument of the dissent,[15] a cogent analysis based on evidence of the New York legislature's purpose, he states that such analysis "cannot override the statute's clear text."[16] But what is that "clear text"? Justice Scalia merely adopts, without discussion or analysis, one of the various meanings of the word "maintained": "By its terms, the [New York] provision precludes a plaintiff from 'maintain[ing]' a class action seeking statutory penalties . . . . [I]t prevents the class actions it covers from coming into existence at all."[17] Thus, he attributes the same meaning to "maintained" in the New York law as it has in Federal Rule 23.[18] Under that assumption, the two conflict and the state rule must be ignored.[19] But is that position at all legitimate? Assume that we accept his general view that we should not

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10. *Id.* at 1436.

11. N.Y. C.P.L.R. § 901(b) (McKinney 1975).

12. Hanna v. Plumer, 380 U.S. 460, 465 (1965).

13. *Shady Grove*, 130 S. Ct. at 1438. *See also Hanna*, 380 U.S. at 465 ("Federal courts sitting in diversity cases, when deciding questions of 'substantive' law, are bound by state court decisions as well as state statutes.").

14. *Shady Grove*, 130 S. Ct. at 1440.

15. *Id.* at 1464-65 (dissenting opinion of Justice Ginsburg, joined by Justices Kennedy, Breyer, and Alito).

16. *Id.* at 1440.

17. *Id.* at 1439.

18. *Id.* ("Both of § 901's subsections undeniably answer the same question as Rule 23: whether a class action may proceed for a given suit.").

19. *See id.* at 1442.

try to ascertain the underlying purpose of legislation on the basis that to do so is too complex and time consuming for the federal courts.[20] Nevertheless when we are left only to deal with the words written, aren't we at least bound to find some rational way to decide what those words mean in the context they are used, especially when the words are subject to different interpretations? The Supreme Court itself, as late as 2003, struggled with the ambiguity of the word "maintain." As stated in *Breuer v. Jim's Concrete of Brevard, Inc.*:

> [T]he word "maintain" enjoys a breadth of meaning . . . "To maintain an action" may mean "to continue" to litigate, as opposed to "commence" an action. *Black's Law Dictionary* 1143 (3d ed. 1933). But "maintain" in reference to a legal action is often read as "bring" or "file"; "[t]o maintain an action or suit may mean to commence or institute it; the term imports the existence of a cause of action."[21]

Is it justifiable for members of the Court merely to adopt an interpretation convenient to their thesis without consideration of the surrounding factors that could give us quite a different result?

I submit that the New York statute does not "clearly" state that a class action for a penalty cannot, in Justice Scalia's words, "[come] into existence at all,"[22] and his opinion provides no reason why one should read the word "maintain" to convey such a procedural meaning. It is certainly arguable that "maintain" means no more than that a plaintiff class has no substantive cause of action for a penalty. If that is the case, then of course, a class action for a penalty can be *pleaded* in federal court and if it meets the requirements of Rule 23, it can, indeed must, be *dealt with* as a class action. But that is as far as Rule 23 goes. The fact that a class action meets the requirements of Rule 23 and thus can be "maintained" in a procedural sense certainly does not mean that the case, or a portion of it, cannot be dismissed on the merits.[23] Federal Rule 23 cannot create a cause of action in a diversity case if no such cause exists under state law.

Therefore, it should have been incumbent on Justice Scalia and the three other justices who joined his opinion in *Shady Grove* to decide exactly what the state statute means when it uses the ambiguous word "maintain." And that requires analysis that is missing from Justice Scalia's opinion.

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20. *Id.* at 1440-41.
21. Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 695 (2003).
22. *Shady Grove*, 130 S. Ct. at 1439.
23. *See, e.g.*, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

Justice Stevens, in his concurrence in the case, takes the position that even if the state statute could be said to govern procedure, if it is intimately involved with the substance of the underlying cause, application of Rule 23 would violate the Rules Enabling Act.[24] Justice Scalia responded that so long as the state rule has a procedural element

other justices from reaching that fundamental issue by assuming there is a "clear text" that has but one possible meaning.

Discussion of the meaning of the New York statute is hardly frivolous. Frequently usage of "maintain" in connection with a party's ability to carry on a lawsuit refers to whether there is or is not a valid claim for relief under the substantive law, rather than whether the case has no business being in court under some procedural proscription. The New York legislature[31] and court of appeal[32] have used "maintain" in that context and so has the Supreme Court of the United States.[33] The *Shady Grove* case required much more serious consideration than it was given by Justice Scalia and those who signed onto his opinion. The consequences of the decision are of substantial significance. It effectively permits a final substantive outcome in the case that is at odds with what would have been decided in a New York court. It thus results in forum shopping of an extreme nature.[34] One can only wonder if the Rules Enabling Act should be read to permit such a determination. The case travels far beyond the scope of other decisions regarding application of a federal rule in a diversity case. For example, in *Hanna v. Plumer*, the issue was whether a federal rule regarding service of process would apply rather than a different state provision.[35] But the

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a state cannot prohibit its courts from entertaining a federal claim, even though the state bars its own courts from hearing identical claims under state law. Haywood v. Drown, 129 S. Ct. 2108, 2117 (2009).

31. *See* N.Y. C.P.L.R. § 9804 (McKinney 1973) ("No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk, or crosswalk being defective. . . .").

32. *E.g.*, Estate of Schneider v. Finmann, 15 N.Y.3d 306, 308-09 (2010) ("At issue in this appeal is whether an attorney may be held liable for damages resulting from negligent representation in estate tax planning that causes enhanced estate tax liability. We hold that a personal representative of an estate may maintain a legal malpractice claim for such pecuniary losses to the estate."); Barry v. Niagara Frontier Transit Sys., 324 N.E.2d 312, 313 (N.Y. 1974) (interpreting N.Y. C.P.L.R. § 9804, *see supra* note 31); Nader v. Gen. Motors Corp., 255 N.E.2d 765, 771 (N.Y. 1970) ("[T]he accosting by girls and the annoying and threatening telephone calls, though insufficient to support a cause of action for invasion of privacy, are pertinent to the plaintiff's [intentional infliction of emotional distress claim]. . . . It will be necessary for the plaintiff to meet the additional requirements prescribed by the law of the District of Columbia for the maintenance of a cause of action under that theory.").

33. *E.g.*, Anza v. Ideal Steel Supply Corp., 547 U.S 451, 457 (2006) ("[W]e conclude [plaintiff] cannot maintain its claim based on § 1962(c)."); United States v. Smith, 507 U.S. 197, 212 (1993) ("[I]t is…obvious that petitioner could maintain a cause of action against a private party whose negligence caused her husband's death in Antarctica.").

34. *See Shady Grove*, 130 S. Ct. at 1447 ("We must acknowledge the reality that keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping.").

35. Hanna v. Plumer, 380 U.S. 460 (1965).

consequences of the decision are not of major importance. A defendant in a federal court must be served according to a federal rule rather than a state provision.[36] That does not have any relation to the merits of the action. Future parties can easily adjust to the different methods of service and neither plaintiff nor defendant need lose its case thereby. But under, *Shady Grove* a future defendant is substantively disadvantaged. A protection afforded under state law, going directly to the outcome of the case, is removed simply because the case is in a federal court, and there is nothing that a defendant can do about it.

CONCLUSION

Whether or not the decision in the *Shady Grove* case is correct on the merits, the oversimplified analysis of four members of the Court who made up the majority of five is disturbing, leading to a general concern about the method by which those justices engage in statutory interpretation.

36. *Id.* at 474.